

E941delc

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

12-CR-802 (KBF)

5 DAVID DELVA,

6 Defendant.

Final Pretrial
Conference

7 -----x

8 New York, N.Y.
9 September 4, 2014
10 10:10 a.m.

11 Before:

12 HON. KATHERINE B. FORREST,

13 District Judge

14 APPEARANCES

15 PREET BHARARA

16 United States Attorney for the
Southern District of New York

17 BY: RYAN P. POSCABLO, ESQ.

JUSTINA L. GERACI, ESQ.

18 Assistant United States Attorneys

ANNIE CHEN, Paralegal Specialist

19 JEFFREY G. PITTELL, ESQ.

20 Attorney for Defendant

21 ALSO PRESENT: JOHN REYNOLDS, Special Agent, FBI

E941delc

(In open court; case called)

THE CLERK: Counsel, please state your names for the record.

MR. POSCABLO: Good morning, your Honor. Ryan Poscablo and Justina Geraci on behalf of the government. With us is paralegal specialist Annie Chen and Special Agent John Reynolds of the Federal Bureau of Investigations.

THE COURT: All right. Good morning, all of you.

MS. GERACI: Good morning, Judge.

MR. PITTELL: Good morning. Jeffrey Pittell for Mr. Delva.

THE COURT: And good morning, Mr. Pittell. And the court notes that Mr. Delva is here present in court this morning. Good morning, Mr. Delva.

THE DEFENDANT: Good morning.

THE COURT: All right. We're here for a final pretrial conference. We've got the trial starting on September 8, which is Monday.

I've got several items on the agenda. The motions *in limine*, just to sort of resolve them. I've reviewed the government's response to them. I want to check in on trial duration. We'll be talking about also the DNA evidence in terms of what the presentation is expected to look like in that regard, how many witnesses, whether it's going to expand the duration of the trial, if so, by how much, etc. So those are

E941delc

1 sort of my matters. Do you folks have additional matters we
2 should put onto the agenda so I can be sure we have a complete
3 list before we begin?

4 MR. POSCABLO: Prior to the conference today, your
5 Honor, the government did prepare sort of a checklist of the
6 items that we think are outstanding.

7 THE COURT: All right.

8 MR. POSCABLO: And I think if your Honor goes through
9 your checklist, I think it will match ours, so --

10 THE COURT: All right. So you'll raise whatever I
11 don't cover with me before the end so we make sure we've got
12 everything taken care of.

13 MR. POSCABLO: Yes, your Honor.

14 THE COURT: All right. Terrific. Let me ask for you
15 folks, both for the government and for the defense, to tell me
16 about the DNA evidence. Where do we stand with that? What's
17 the presentation going to look like? Are there any outstanding
18 loose ends we need to go over? And let me just sort of say, as
19 a preliminary matter, as we all know, we had adjourned the
20 trial in July in order to give the defendant an opportunity to
21 respond to the DNA evidence and I did get a subsequent request
22 in August for an adjournment, which I denied on the basis that
23 there was sufficient time in what we had already previously
24 arranged to allow the parties to respond to the DNA evidence
25 and could confer as appropriate. And so if there is something

E941delc

1 that anybody wants to raise as to an issue in that regard, I'm
2 not particularly interested in hearing a request for an
3 adjournment, but if there was something that really was not
4 able to be done that would have been done with one or two more
5 days, I just would like to hear about it.

6 MR. POSCABLO: Not from the government, your Honor.

7 THE COURT: All right. Mr. Pittell?

8 MR. PITTELL: No, none from us.

9 THE COURT: All right. So then I'm going to assume,
10 unless somebody wants to tell me otherwise, that the parties
11 have had an appropriate opportunity then to adjust their trial
12 strategy to the DNA evidence.

13 MR. POSCABLO: We have, your Honor.

14 MR. PITTELL: That's correct.

15 THE COURT: All right. Now, Mr. Poscablo -- oh,
16 Mr. Delva, is there something you wanted to say? Maybe you
17 should talk to your lawyer. Mr. Pittell?

18 (Defendant and his counsel conferring)

19 THE COURT: All right. If there's another issue you
20 folks want to raise before we get to the end of today's
21 session, let's make sure that we raise it.

22 MR. PITTELL: Yes, I told Mr. Delva we'll bring it up
23 at the end.

24 THE COURT: All right. Terrific. We'll go through my
25 list and then we'll get to the respective lists that you folks

E941delc

1 may have.

2 Mr. Poscablo or Ms. Geraci, how long is the
3 government's presentation on the DNA expected to last? Does it
4 involve any new witnesses?

5 MR. POSCABLO: No, your Honor. I think the government
6 expects to call criminalist Diana Cooke, who we expect to
7 testify approximately about an hour, hour and a half. I think
8 the additional DNA evidence in this case doesn't lengthen her
9 testimony any more than five, ten minutes at most.

10 I would alert the court that, given the defendant's
11 notice of an expert, a DNA expert, we may call a rebuttal
12 witness, at the end of the defense case, if there is a defense
13 case, which shouldn't take any more than an hour of direct;
14 certainly less, I think.

15 THE COURT: All right. So from your perspective,
16 Mr. Poscablo, it's not expected that the DNA evidence will
17 materially lengthen the trial.

18 MR. POSCABLO: No, your Honor. And as the court
19 knows, and I just learned about a week ago, there was already
20 DNA evidence in the case and, you know, so Ms. Cooke's
21 testimony was already going to take a certain amount of time.

22 THE COURT: Right. And I do know that Ms. Cooke was
23 number 9 on the previously submitted witness list. The
24 numbering is my handwritten numbering. She appears ninth on
25 the list. There wasn't numbering on the list, but she was

E941delc

1 ninth on the list before. All right.

2 MR. POSCABLO: Thank you.

3 THE COURT: Mr. Pittell, from your perspective, in
4 terms of responding to the new evidence, is there going to be
5 any new witnesses called, at least in terms of a potential
6 expectation at this point?

7 MR. PITTELL: Yes. I've noticed the government that I
8 plan on calling a rebuttal expert. I don't expect the delay to
9 be that significant, probably somewhere along the lines of the
10 government's direct, an hour, hour and a half.

11 THE COURT: All right. What's the name of that
12 individual?

13 MR. PITTELL: Suzanna Ryan. What I'll do -- I only
14 sent the notice to the government. I didn't file it on ECF.
15 I'll file it. Her name is also going to be on the revised
16 witness list that the court is going to get.

17 THE COURT: Was it O'Ryan or Ryan?

18 MR. PITTELL: No, Suzanna Ryan.

19 THE COURT: Oh, Suzanna Ryan. All right. And is she
20 a PhD, MD, any kind of title that I need to know?

21 MR. PITTELL: No, no doctor title.

22 THE COURT: All right. Terrific. And so that won't
23 be a material lengthening but it will be some addition.

24 MR. PITTELL: Yes.

25 THE COURT: All right. Terrific.

E941delc

1 Okay. In terms of other issues, I wanted to deal with
2 two other issues relating to the motions *in limine*. One
3 relates to Dr. Rosenbaum. The issue with Dr. Rosenbaum, which
4 we had dealt with in the prior motion *in limine* discussion that
5 we had in July, relates to whether or not, number one, she's an
6 appropriate witness to testify as an expert, and, two, the
7 nature of her testimony. During our last discussion in July,
8 we had asked Mr. Pittell for a proffer, and we did get a
9 proffer, that she would be limited in her testimony to
10 definitions to assist the jury in understanding certain words
11 and terms that were being used.

12 I've received and read the government's response to
13 that proffer, and that was in a letter that's dated I believe
14 today's date, and the government takes the position that
15 Dr. Rosenbaum would not be appropriate. I disagree with that.
16 Under Federal Rule of Evidence 702, an expert witness may
17 testify as to an opinion or otherwise, and that is in the
18 language of the rule. It's not required that Dr. Rosenbaum or
19 any expert who is otherwise qualified actually have a, quote,
20 opinion. In addition, an expert witness must meet three
21 categories under the Federal Rules of Evidence, and
22 Dr. Rosenbaum's medical training would give her the scientific
23 expertise. The fact that she appears to be using standard
24 medical terminology and not doing anything different or
25 applying some other alternative definition would also result in

E941delc

1 her methodology being reliable, and there's no real reason to
2 have to inquire into it.

3 So putting aside any issues relating to the
4 authenticity or the admissibility of the medical records
5 themselves -- that's a separate issue -- to the extent that
6 there is terminology offered in these proceedings relating to
7 Mr. Accilien's prior medical history, I will allow that.

8 Now the government also raised Rule 608. Rule 608
9 relates to testimony going to truthfulness or untruthfulness,
10 and there are cases that the government cites where the other
11 courts in the past have certainly disallowed certain
12 psychiatric testimony that purports to opine on the witness'
13 propensity for truthfulness. That, as I understand from
14 Mr. Pittell's prior proffer, is not the intent for
15 Dr. Rosenbaum. Dr. Rosenbaum is going to give definitions, for
16 instance, as to something along the lines of paranoid
17 schizophrenia and what that means in terms of a definition, and
18 she may be able to do that in a manner that's more
19 comprehensible than DSM-IV, which is the medical dictionary
20 which Mr. Pittell had attached to his letter in July. I think
21 it was helpful for Mr. Pittell to have done that because a
22 quick review of that dictionary definition only reinforces the
23 need for Dr. Rosenbaum to perhaps assist the jury with
24 translating that into layperson's terms.

25 Now the government understandably may want to

E941delc

1 cross-examine Dr. Rosenbaum on the fact that she has no
2 particular independent basis for knowing whether or not
3 Mr. Accilien has or has not been appropriately diagnosed with
4 these. She's only going to be a witness for the terms, the
5 definitions, not with respect to whether or not Mr. Accilien
6 has a psychiatric condition which would prevent him or change
7 the nature of his credibility. So I think that given the
8 parameters of what Mr. Pittell has offered in terms of
9 Dr. Rosenbaum and in terms of the expected testimony, I will
10 allow her.

11 Now that's separate, Mr. Pittell, from how you're
12 planning on getting any medical records in. Presumably you
13 folks will have dealt with that either through a stipulation or
14 custodian of records or calling a treating physician or just
15 asking Mr. Accilien himself if he recalls if he's been
16 diagnosed with X, Y, or Z. But that will be up to you to
17 separately go into. I don't have a motion before me on that at
18 this point.

19 All right. Is there anything anybody wants to raise
20 on Dr. Rosenbaum?

21 MR. POSCABLO: Judge, just so the record's clear, the
22 government's also arguing that Rosenbaum's testimony at this
23 point isn't necessarily relevant, and what I mean by that is,
24 if Dr. Rosenbaum is going to testify about terms that
25 presumably come in, psychologic and psychiatric terms that are

E941delc

1 attached to Mr. Accilien, if those terms don't come out,
2 meaning the medical records don't come in or Mr. Accilien
3 doesn't know what he's diagnosed with, then I think the
4 government deserves the right to object to Dr. Rosenbaum's
5 testimony on relevance grounds.

6 THE COURT: If it turns out that Dr. Rosenbaum gets on
7 the stand and is using terms coming out of the blue and she's
8 the only person in the entire proceeding at that point who's
9 talking about paranoid schizophrenia, that's a different
10 situation. I'm assuming that since this witness we all know
11 has a significant and serious history of psychiatric issues,
12 which arguably could go to the jury's view as to his
13 credibility, that Dr. Rosenbaum may have a role. Sufficient
14 unto the day. If she doesn't, she doesn't, but I'm assuming
15 she could be helpful to the jury in explaining terms that they
16 may have heard, or if it's going to be the case that
17 Mr. Pittell makes a proffer that seems to have evidentiary
18 foundation that these terms are going to come in and he wants
19 to precede the introduction of those terms with the doctor,
20 then we would talk about that order, and I wouldn't necessarily
21 require Dr. Rosenbaum to follow but I would want a proffer that
22 the evidence is going to come in.

23 MR. POSCABLO: Right. Thank you, your Honor.

24 THE COURT: Mr. Pittell, does that all make sense?

25 MR. PITTELL: Yeah. I mean, it's going to come in

E941delc

1 that he's been diagnosed. If it doesn't come in, if he denies
2 it, he's going to get impeached by the records, where in the
3 records he self-diagnoses, as well as he's been diagnosed by
4 the doctor. So it's going to come out. If he denies it, the
5 records are going to go in, or be used to impeach him, and then
6 Dr. Rosenbaum will be explaining. If he admits it,
7 Dr. Rosenbaum will be useful.

8 THE COURT: I think the evidentiary point, just so
9 that we're all on the same page for when that moment comes,
10 because we may want to deal with it that morning in particular
11 or deal with it at any point in advance to give us all more
12 time to respond, is, there may be a difference between what he
13 states he understands he was diagnosed with and the words and
14 terminology he may use, which may or may not follow a technical
15 definition, in the records. The records themselves, for
16 impeachment purposes, would simply be if he's even seen them,
17 right, and has any basis to sort of look at them. But they're
18 going to be hearsay. So you're not going to be able to put the
19 records, just standing alone, up on the screen to have some
20 third-party doctor's handwritten statement based upon who knows
21 what kind of examination with terms. So I just say that so
22 that we're all on the same page about how this could play out.
23 I mean, if Mr. Accilien gets up there, I fully expect he will
24 say, as he did during his plea, he's been diagnosed with
25 whatever he's been diagnosed with, and I've forgotten what the

E941delc

1 words are. And the medications are what the medications are.
2 That may be enough to provide the basis for Dr. Rosenbaum or
3 not. But we'll just take it one step at a time.

4 MR. PITTELL: I think we're all on notice.

5 THE COURT: All right. Terrific.

6 Now the second issue was the male victim's prior
7 convictions. And as I had said during the prior conference in
8 July, there's a difference between prior convictions and prior
9 arrests. We're going to put to the side and assume, unless
10 someone tells me otherwise, that the arrests, under
11 longstanding caselaw, are not something as to which he's going
12 to be cross-examined. Mr. Pittell, am I right about that?

13 MR. PITTELL: Yes.

14 THE COURT: All right. So we're talking about the
15 convictions. Now as I had raised during the prior conference
16 and as the government has responded to, and had been raised by
17 Mr. Pittell in terms of the aggregation of convictions issue,
18 the question is whether or not there's a way in which this
19 relates to bias. It is my view, having reviewed the
20 government's letter on this, that it does still go to bias, and
21 I will allow a limited amount in on these prior convictions.
22 These are the convictions which predate the illegal entry of
23 the male victim. As I understand it, the government had no
24 objection to the moment of illegal reentry and the conditions
25 and circumstances of that reentry to the present, including the

E941delc

1 witness saying: I'm a drug dealer. I'm testifying under
2 immunity. The reason why I am going to allow certain limited
3 testimony on prior convictions which predate that deportation
4 is because, while I do understand that there are no promises as
5 to a certification of helpfulness for immigration purposes, it
6 does appear that there are conversations which have occurred.
7 Unless somebody wants to proffer that the male witness has no
8 intention of ever applying for a certification of helpfulness,
9 then I think the jury's entitled to know that there may be a
10 hole that this guy has dug for himself by being not just a drug
11 dealer but a significant drug dealer. He'd been accused, I
12 believe, of a CCE in the past, a continuing criminal
13 enterprise. So therefore, while under the standards set forth
14 in the government's footnote for obtaining a certification of
15 helpfulness, conviction of prior crimes is not a criterion,
16 that is separate and apart from whether or not, in the totality
17 of circumstances, an individual's prior circumstances of
18 conviction would be relevant to an immigration authority. It
19 clearly is generally taken into account by immigration
20 authorities whether or not an individual has prior felony
21 convictions. Therefore, the court's going to assume he's going
22 to get a certification of helpfulness and that that may do more
23 for him in the context of his prior past and that therefore he
24 wants it even more. So it can go to bias, right? Because
25 otherwise, I think his bias may not be fully formed.

E941delc

1 With that said, I want these prior convictions to be
2 very short and not to be a trial within a trial. It should
3 simply be prior conviction, what it was for, sentence imposed.
4 It's two minutes, not twenty minutes, per conviction. So it's
5 really just very short. It's not: Weren't you on the street
6 with John Doe doing X, Y and Z, weren't there 27 people
7 involved in the whatever it was? It's really: Weren't you
8 arrested for this, weren't you then convicted either through a
9 plea or otherwise, and weren't you then deported? And it sort
10 of gives also the history of the deportation. Now that does
11 not in any way implicate the hitting the guy over the head with
12 the baseball bat, which I don't think was the subject of a
13 conviction. It was the subject of an arrest. It doesn't
14 implicate the domestic violence incident relating to JA. I'm
15 really talking about the prior drug convictions prior to his
16 deportation. If there's something else which I'm missing, then
17 let me know. But that's what I'm referring to, short and
18 sweet.

19 Does anybody want to respond to the court's rationale
20 or seek further definition as to what it encapsulates? Do we
21 all understand what we're going after?

22 MR. POSCABLO: Yes, your Honor. And I think what
23 we'll do is I'll speak with Mr. Pittell after the conference
24 today to figure out which convictions he intends to go into,
25 and if we can agree, then we'll agree about that.

E941delc

1 THE COURT: All right. Terrific. Terrific. If
2 there's any issues at all, let me know. I went through what
3 had been raised in the motion *in limine* and I believe they were
4 just prior drug convictions. There were other arrests, and
5 that's what we've put to the side.

6 MR. POSCABLO: Thank you, your Honor.

7 THE COURT: Mr. Pittell, do you understand what the
8 court's direction is in this regard?

9 MR. PITTELL: Yes, I do.

10 THE COURT: All right. That, combined with the
11 court's prior draft opinion on the motions *in limine*, resolves
12 the outstanding motions *in limine*. I'm going to revise the
13 opinion to reflect these rulings and then put that out so we've
14 got that.

15 All right. Those are the matters which I had. Other
16 than that, we had dealt with some of the other matters before,
17 in terms of jury instructions, how the jury would be selected,
18 etc., etc. I don't think there's actually any reason to start
19 before 9:30 on Monday, not 9. The reason for that is there are
20 a number of criminal trials Monday for which there is going to
21 be jury selection going on. I don't know what time we're going
22 to get our pool as a result. I hope we're one of the early
23 ones because my method sends jurors back on an ongoing basis
24 and so I'm hopeful that will give them an incentive to give us
25 an early group, but I don't know. I think there are eight jury

E941delc

1 trials. So just be aware. I don't know if we'll get a morning
2 group or an afternoon group. But we'll figure that out. So
3 let's start at 9:30 on Monday.

4 What else do you folks have? Mr. Poscablo, you had a
5 list and Mr. Pittell had a list?

6 MR. POSCABLO: We do, your Honor. Ms. Geraci prepared
7 a thorough list.

8 Your Honor, we had an updated witness list. I think
9 we filed it on ECF. If we haven't, we'll do so after the
10 conference. What we're doing is trying to streamline the case,
11 and I think we took one witness off of that list.

12 THE COURT: All right.

13 MR. POSCABLO: The voir dire has already been filed,
14 your Honor.

15 I did have a question regarding the requests to
16 charge. I think all of them have been filed, meaning the
17 government has filed theirs and Mr. Pittell has filed his,
18 first, second, supplemental sort of objections or questions.
19 What is your Honor's practice? Does your Honor intend to have
20 a charge conference? Someone had mentioned to me that we might
21 be discussing the charge in the mornings or at breaks in order
22 to expedite the process.

23 THE COURT: Yes, that's what we'll do. If the
24 question is, are we going to have a separate sort of half a day
25 for the charging conference, the answer is no. You tried the

E941delc

1 Rosario case, which was a jury trial, so it's similar.

2 MR. POSCABLO: No, that was --

3 THE COURT: That was a bench?

4 MR. POSCABLO: That was a bench trial.

5 THE COURT: Oh, that was? Okay. All right. That's
6 right. That was unusual that way.

7 MR. POSCABLO: That was.

8 THE COURT: So we didn't have jury instructions. But
9 my practice is, I'll give you a set of the jury instructions
10 probably on Tuesday or Wednesday, you'll then have 24 hours or
11 so, if you can, or we'll see how the trial is going and how
12 timing is going and where we are and how much time we think we
13 have, and we'll adjust ourselves. It's best for me and you if
14 you can do redline changes with your comments in Word, you
15 know, to track changes, but if you can't, we'll go through them
16 one by one each morning thereafter as time permits. We'll take
17 housekeeping for that day first, do some charges after that
18 during breaks, and we typically get through it.

19 MR. POSCABLO: Okay.

20 THE COURT: All right? Let me just raise one thing,
21 which may or may not come up. It depends on how the trial
22 proceeds. But if the trial looks like it's proceeding in a
23 manner where we're going to have a chunk of an afternoon after
24 the parties have rested, after the defense has rested, after
25 everybody's done, and you folks would prefer to start the next

E941delc

1 morning for closings, what I've done in the past is start to
2 charge the jury or charge the jury entirely before the
3 summations, to use that time. It allows you then to have a
4 chunk of time to get ready for the summations but allows me not
5 to have to have the jury go home at midday if there's something
6 useful that we can do. If the parties object to that, I can do
7 that with or without your objection, but if you objected to
8 that, then we can talk about whether or not I would stop, for
9 instance, after the preliminary charges, you know, the first 20
10 pages, where we'd go through circumstantial evidence, burden of
11 proof, and stop before I get to the elements of the causes of
12 action of the crimes charged or whether you don't care. But
13 we'll talk about that. It may or may not happen.

14 MR. PITTELL: I actually prefer that you do that.

15 THE COURT: You do. All right.

16 MR. PITTELL: Regardless of the timing. I mean,
17 that's just my personal preference. I don't know if the
18 government agrees or doesn't agree.

19 MR. POSCABLO: We think it's a fine idea, your Honor.

20 THE COURT: Well, it depends. In this case there are
21 a number of charges and the charge itself may take awhile. So
22 there's some benefit to splitting it up. And I'm not saying
23 splitting it up before or after the summations but just having
24 the jury have a break of some kind, whether it be an overnight
25 or lunch break or 15-minute break, and then pick it up again.

E941delc

1 But we'll talk about that, and if there's no objection to it,
2 then it will give us more maneuvering room in terms of how we
3 proceed.

4 All right. What else?

5 MR. POSCABLO: There's an exhibit list that we filed,
6 your Honor. I think we are in discussions with counsel with
7 regards to his objections regarding some of those. We'll front
8 those issues with the court if there are any. We already
9 submitted a verdict sheet. There are stipulations between the
10 parties which are great. Thank you to Mr. Pittell and his
11 client. That will expedite the case.

12 With regards to the government's plan, we have
13 approximately 12 witnesses, and we had planned, given our
14 understanding of your Honor's sort of efficiency with regards
15 to jury selection, that we would open on Monday. Assuming we
16 do open on Monday and call our first or second witness on
17 Monday, our anticipation is that we would be ready to rest late
18 Thursday afternoon or -- and your Honor's not sitting on
19 Friday -- or Monday. So we'll be resting by Monday at the
20 latest, in our estimation.

21 THE COURT: All right. I think that actually
22 corresponds with what we thought in July. And that means,
23 Mr. Pittell, you'd be picking up sometime likely on Monday.

24 MR. POSCABLO: Just three other things, your Honor.
25 First, Special Agent Reynolds will be sitting at counsel table

E941delc

1 during trial.

2 THE COURT: Were you able to solve his issue? I think
3 it was Judge Schofield?

4 MR. POSCABLO: Yes, your Honor. That trial got
5 adjourned for directly after this trial.

6 Oh. He does have a hearing the first day so he may
7 have to step out, but generally speaking, he will be here. We
8 also anticipate that Special Agent Reynolds will testify at the
9 end, sort of as the case agent in this case.

10 Second thing is that Ms. Chen has an engagement during
11 the first day of trial, during jury selection, so another
12 paralegal specialist, Darcy Brady, will be sitting in for her.
13 So we ask that she be included on the list in the sort of
14 introduction to the jury or what have you.

15 And then in addition to that, Special Agent Kim
16 Marcus, who is Special Agent Reynolds' partner, she's going to
17 be in the courtroom sort of helping funnel witnesses in. I
18 don't know if it's your Honor's practice to also introduce her
19 so that the jury knows who the lady is in the back who's at
20 every day of trial. If not --

21 THE COURT: You know, I don't have a practice in that
22 regard. If you folks want her to be introduced, you can.
23 We'll do that in some casual way. They'll figure it out.

24 MR. POSCABLO: Yes, they will.

25 THE COURT: Because they'll be intensely interested in

E941delc

1 everything that goes on here.

2 MR. POSCABLO: That's true.

3 THE COURT: So they'll know exactly who's who.

4 MR. POSCABLO: Right. And the final thing, your
5 Honor -- and I mentioned this to Mr. Pittell yesterday, on a
6 conversation over a call. Because we know that the defense
7 intends to call witnesses, we asked him when he anticipated to
8 produce 3500. The answer I got was that there was no 3500
9 material for any of his witnesses. And we accept Mr. Pittell
10 at his word. But there is one thing that I wanted to raise to
11 the court, and we'll try to work it out, but I wanted to front
12 it for the court. Mr. Pittell did indicate that there were
13 e-mail exchanges between himself and his DNA expert, that a
14 report was not produced. And I think it's our position that
15 any e-mail correspondence between Mr. Pittell and the DNA
16 expert regarding her testimony would fall under 3500 material.
17 I think his position is that it's work product, but I think if
18 she's providing an opinion to him in an e-mail and she's going
19 to testify about that opinion, I think it falls within the
20 rubric of 3500 material.

21 THE COURT: Why don't you folks do this. You may want
22 to find out whether or not the e-mails you're talking about
23 have any substantive content, and if so, write a short letter
24 stating your position, Mr. Pittell can respond in a short
25 letter, and then I'll rule. But figure out whether or not

E941delc

1 there's any "there" there because if there is, that's one
2 thing. If there's not, that's something else. And I'm mindful
3 of Rule 16, but typically, the back-and-forth -- well, you
4 folks will brief how it relates to 3500.

5 MR. PITTELL: We'll discuss this. If we agree to
6 disagree, I would imagine submissions to the court would be
7 relatively brief.

8 MR. POSCABLO: Yes.

9 THE COURT: All right.

10 MR. POSCABLO: And that's it from the government, your
11 Honor. Have a good weekend.

12 THE COURT: Okay. And let me find out from you,
13 Mr. Pittell, what's on your list?

14 MR. PITTELL: Your Honor, the only thing that hasn't
15 been covered that I think we should address is, on the prior
16 exhibit list which was submitted with my marked-up objections,
17 I think many of the objections the court could probably rule
18 from the bench, if the exhibit's going to go in. However, the
19 issue regarding the letters may be something that we should
20 discuss now or before it goes in. I had on my objection list
21 indicated I do not object to the envelope going in but I do
22 object to the actual letter. Also, I mean, my objection at the
23 time was that the letters were hearsay, not subject to any
24 exception. When I had written this, I think the *Riley* case
25 from the Supreme Court regarding searches of cellphones may

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1 have been decided, but other than hearing about it, I hadn't
2 read the case. I don't know if the court's going to allow the
3 letters to go in, but if the court is contemplating allowing it
4 to go in, I think by analogy, the search of the cellphone is
5 arguably the same thing as opening up an envelope and searching
6 it without warrant. So --

7 THE COURT: Although the basis for the Supreme Court's
8 ruling in that regard had to do in particular with some of the
9 technology involved with cellphones and the breadth of
10 exploration of an individual's life that could occur.

11 MR. PITTELL: I agree. There are differences. I just
12 would like to just bring that up if the court is inclined to be
13 allowing to let it in, perhaps raise brief supplemental
14 argument on that.

15 THE COURT: Well, why don't you go ahead and put in a
16 brief supplemental argument on that. We're having the
17 discussion for the first time so I'd like to think about the
18 evidentiary issue you've just raised, Mr. Pittell. On the
19 substance, it struck me that there were two things in play.
20 One is, much of the content was nonhearsay, not for the truth;
21 it was just for the fact that it was said. And to the extent
22 there was something which could be construed as potentially
23 inculpatory, that would be potentially an admission of a
24 co-conspirator in furtherance of the conspiracy in the sense of
25 attempting to procure continued cooperation and silence, so

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1 while there had been an arrest which had already occurred,
2 there's of course caselaw that a co-conspirator statement
3 trying to procure silence as to prior events can be in
4 furtherance of. So that was the basis for the court's belief
5 that as an evidentiary matter on the content, the written
6 content, if you will, they would be allowable. But I had not
7 thought about the searching aspect.

8 MR. PITTELL: I mean, along those lines, my reading of
9 the letter is really one critical sentence. I mean, maybe
10 there's some other ones, but there's the one in there, in one
11 of the letters, where he more or less says: You guys are glad
12 that I'm not saying anything. I'm just paraphrasing it. You
13 know, I view that as not in furtherance, though, because he's
14 just saying: Hey, you guys are lucky I'm keeping my mouth
15 shut, I'm not ratting you out. That's not trying to procure
16 silence, that's not trying to, you know, get them not to,
17 because they've been arrested and not cooperating. I mean,
18 first of all, it's sent to Mr. Accilien, not to Mr. Delva.

19 THE COURT: No. I viewed it as a co-conspirator
20 statement, however, so it would be attributable to.

21 MR. PITTELL: It's a statement by a co-conspirator,
22 but in order for it to be admissible, it's got to be in
23 furtherance of the conspiracy and it cannot be idle chatter,
24 and I would argue that it's not in furtherance of the
25 conspiracy and that it's idle chatter. I mean, we haven't

E941delc

1 really gotten into it because I just simply wrote: Objection,
2 not subject to any hearsay exception. I was going to kind of
3 wait and see how the court was going to go and to see, if you
4 were going to let it in, then we should make some supplemental
5 argument. But the point I'm making is, I view it as a complex
6 issue that we should all give significant thought and
7 discussion to. I don't know if you want to do it now, if you
8 want to do it on briefing, if you want to do it at some point
9 during the trial. I'm just raising it now.

10 THE COURT: No, I think it's --

11 MR. PITTELL: I see it as an issue.

12 THE COURT: No, you were right to raise it. Let's do
13 it on some additional briefing. It can be in the form of a
14 formal letter. You don't have to do a memorandum. But let's
15 do it as letter submissions raising the issues so that
16 everybody can preserve their respective positions. I would
17 like to think about that particular sentence and the manner in
18 which you have cast that particular sentence and see what the
19 government says in response to it. Things which are open to
20 dual interpretations, one of which could be considered in
21 furtherance of and one of which might not be, we'd have to
22 think about which way that tips. But let's put in papers on
23 that. These are going to come in not on the first day?

24 MR. POSCABLO: No, your Honor, not on the first day.

25 THE COURT: All right. So why don't we say --

E941delc

1 MR. PITTELL: I was going to ask the government, what
2 date do you expect Accilien to testify? Oh, actually wait,
3 they're going to come in through Agent Reynolds, who's going to
4 be the last -- I think he will cover them.

5 MR. POSCABLO: It will be day two or three, your
6 Honor.

7 THE COURT: I think Mr. Pittell, by virtue of having
8 raised the objection and he's expressed his view and some
9 additional thoughts on it, let's take that as an opening
10 volley. Why doesn't the government put in what it can on --
11 today's Thursday and Monday's coming up.

12 MR. POSCABLO: We can do it tomorrow. We'll try to do
13 it tonight.

14 THE COURT: Okay. Terrific. Mr. Pittell, if you can
15 do something by Monday morning, that would be terrific. I'll
16 review it before I come out on the bench and then we'll talk
17 about it on Monday when we start. It's going to take awhile to
18 get the jury anyways, as we've discussed.

19 MR. POSCABLO: Ms. Geraci reminded me that in case
20 there are any other things on the exhibit list that we can't
21 resolve, we'll brief those as well. I think they're minor,
22 but -- Thank you, your Honor. And that's it from the
23 government, your Honor.

24 THE COURT: All right.

25 MR. PITTELL: That's it from us too.

E941delc

1 THE COURT: All right. So we've got ourselves a plan
2 of action. We'll start Monday morning. We'll start at 9:30.

3 Mr. Delva, did Mr. Pittell cover the matter that you
4 wanted?

5 MR. PITTELL: No. He has an issue. I think it may be
6 better to address it *ex parte*.

7 THE COURT: All right.

8 MR. PITTELL: It's a legal issue. I would prefer not
9 to bring it up in front of the government.

10 THE COURT: I understand. Why don't you --

11 MR. PITTELL: If there's a necessity to bring the
12 government in, we can do that, but --

13 THE COURT: Why don't you bring it up *ex parte*. If I
14 disagree with it being *ex parte*, I'll let you know before I
15 post anything to the docket, but go ahead if you think it's
16 that kind of issue to raise it and we'll take it from there.
17 All right? We'll take it one step at a time.

18 Mr. Delva?

19 THE DEFENDANT: Yeah. I had also mailed you about the
20 situation about what I asked him just now so I don't know. You
21 should be getting a letter within this week, probably by
22 tomorrow.

23 THE COURT: All right. Well, I've not received a
24 letter from you.

25 THE DEFENDANT: I sent it in Tuesday morning.

E941delc

1 THE COURT: Yes. And sometimes the mail from the --
2 you're at the MCC or MDC?

3 THE DEFENDANT: MCC.

4 THE COURT: Even from next door, for reasons I don't
5 know, it takes a little while. It goes through whatever it
6 goes through. Make sure that I hear whatever you want to hear
7 about if it's *ex parte* before Monday, all right? Because
8 Monday we're starting trial.

9 THE DEFENDANT: How do I know that it's been sent?

10 THE COURT: I don't have any control over that either.
11 The mail situation is whatever the mail situation is. So my
12 deputy I see is dialing, which means he's going to check with
13 our mailroom and find out if we have it. If not, perhaps,
14 Mr. Pittell, if you know the content, you could raise that in
15 the *ex parte* letter as well. All right?

16 MR. PITTELL: I haven't seen the letter.

17 THE COURT: All right. We'll take it one step at a
18 time.

19 The mail hasn't come yet today. All right.

20 All right. Anything further?

21 MR. PITTELL: I just wanted to speak to Mr. Poscablo.

22 (Counsel conferring)

23 THE COURT: All right. Then we are adjourned. Thank
24 you.

25 ALL COUNSEL: Thank you, your Honor.